

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

|                                 |                               |
|---------------------------------|-------------------------------|
| DEBORAH ANN PRUE,               | )                             |
|                                 | ) No. CV-08-00308-JPH         |
| Plaintiff,                      | )                             |
|                                 | ) ORDER GRANTING PLAINTIFF'S  |
| v.                              | ) MOTION FOR SUMMARY JUDGMENT |
|                                 | ) AND REMANDING FOR FURTHER   |
| MICHAEL J. ASTRUE, Commissioner | ) ADMINISTRATIVE PROCEEDINGS  |
| of Social Security,             | )                             |
|                                 | )                             |
| Defendant.                      | )                             |
|                                 | )                             |
|                                 | )                             |

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on April 24, 2009. (Ct. Rec. 13, 16). Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13), **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 16), and REMANDS for further proceedings.

**JURISDICTION**

Plaintiff protectively filed applications for SSI benefits and Title II benefits on August 31, 2004, alleging onset as of

1 October 21, 2003. (Tr. 23, 88-91.) The applications were denied  
2 initially and on reconsideration. (Tr. 81-82, 85-87, 587-588, 590-  
3 593.) Administrative Law Judge (ALJ) R. J. Payne held a hearing  
4 on April 26, 2007. (Tr. 610-622.) Plaintiff, who had lost contact  
5 with counsel, did not appear. Plaintiff's counsel appeared and  
6 expert psychologist Allen Bostwick, Ph.D., testified. (Tr. 608-  
7 622.) At a supplemental hearing on September 24, 2007, plaintiff  
8 and vocational expert Sharon Welter testified. (Tr. 625-669.) On  
9 November 7, 2007, the ALJ issued a decision finding that plaintiff  
10 was not disabled. (Tr. 20-33.) The Appeals Council denied a  
11 request for review on August 19, 2008. (Tr. 5-9.) Therefore, the  
12 ALJ's decision became the final decision of the Commissioner,  
13 which is appealable to the district court pursuant to 42 U.S.C. §  
14 405(g). Plaintiff filed this action for judicial review pursuant  
15 to 42 U.S.C. § 405(g) on October 7, 2008. (Ct. Rec. 2,4.)

#### 16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing  
18 transcript, the ALJ's decision, the briefs of both Plaintiff and  
19 the Commissioner, and will only be summarized here.

20 Plaintiff was 26 years old at the time of the supplemental  
21 hearing and has a high school education. (Tr. 108, 629.) She has  
22 worked as a telephone solicitor, fast food worker, ward attendant,  
23 kitchen helper, short order cook, home attendant, and janitor.  
24 (Tr. 103, 115, 657-658.) Plaintiff's applications alleged  
25 disability as of October 21, 2003, due to PTSD, borderline  
26 personality disorder, dissociative disorder, and major depression.  
27 (Tr. 80, 85.) Plaintiff's request for reconsideration alleges  
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1 disability due to severe mental health problems including extreme  
2 depression, bipolar disorder, PTSD, and borderline personality  
3 disorder. (Tr. 83.)

#### 4 SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act (the "Act") defines "disability"  
6 as the "inability to engage in any substantial gainful activity by  
7 reason of any medically determinable physical or mental impairment  
8 which can be expected to result in death or which has lasted or  
9 can be expected to last for a continuous period of not less than  
10 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
11 Act also provides that a Plaintiff shall be determined to be under  
12 a disability only if any impairments are of such severity that a  
13 plaintiff is not only unable to do previous work but cannot,  
14 considering plaintiff's age, education and work experiences,  
15 engage in any other substantial gainful work which exists in the  
16 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
17 Thus, the definition of disability consists of both medical and  
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
19 (9<sup>th</sup> Cir. 2001).

20 The Commissioner has established a five-step sequential  
21 evaluation process for determining whether a person is disabled.  
22 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
23 is engaged in substantial gainful activities. If so, benefits are  
24 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
25 not, the decision maker proceeds to step two, which determines  
26 whether plaintiff has a medically severe impairment or combination  
27 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
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1 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination  
3 of impairments, the disability claim is denied. If the impairment  
4 is severe, the evaluation proceeds to the third step, which  
5 compares plaintiff's impairment with a number of listed  
6 impairments acknowledged by the Commissioner to be so severe as to  
7 preclude substantial gainful activity. 20 C.F.R. §§  
8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
9 App. 1. If the impairment meets or equals one of the listed  
10 impairments, plaintiff is conclusively presumed to be disabled.  
11 If the impairment is not one conclusively presumed to be  
12 disabling, the evaluation proceeds to the fourth step, which  
13 determines whether the impairment prevents plaintiff from  
14 performing work which was performed in the past. If a plaintiff  
15 is able to perform previous work, that Plaintiff is deemed not  
16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
17 At this step, plaintiff's residual functional capacity ("RFC")  
18 assessment is considered. If plaintiff cannot perform this work,  
19 the fifth and final step in the process determines whether  
20 plaintiff is able to perform other work in the national economy in  
21 view of plaintiff's residual functional capacity, age, education  
22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon plaintiff to establish  
25 a *prima facie* case of entitlement to disability benefits.  
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
27 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
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1 met once plaintiff establishes that a physical or mental  
2 impairment prevents the performance of previous work. The burden  
3 then shifts, at step five, to the Commissioner to show that (1)  
4 plaintiff can perform other substantial gainful activity and (2) a  
5 "significant number of jobs exist in the national economy" which  
6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
7 Cir. 1984).

8 Plaintiff has the burden of showing that drug and alcohol  
9 addiction (DAA) is not a contributing factor material to  
10 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9<sup>th</sup> Cir.  
11 2001). The Social Security Act bars payment of benefits when drug  
12 addiction and/or alcoholism is a contributing factor material to a  
13 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
14 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there  
15 is evidence of DAA and the individual succeeds in proving  
16 disability, the Commissioner must determine whether the DAA is  
17 material to the determination of disability. 20 C.F.R. §§  
18 404.1535 and 416.935. If an ALJ finds that the claimant is not  
19 disabled, then the claimant is not entitled to benefits and there  
20 is no need to proceed with the analysis to determine whether  
21 substance abuse is a contributing factor material to disability.  
22 However, if the ALJ finds that the claimant is disabled, then the  
23 ALJ must proceed to determine if the claimant would be disabled if  
24 he or she stopped using alcohol or drugs.

#### 25 STANDARD OF REVIEW

26 Congress has provided a limited scope of judicial review of a  
27 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
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1 the Commissioner's decision, made through an ALJ, when the  
2 determination is not based on legal error and is supported by  
3 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
4 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
5 1999). "The [Commissioner's] determination that a plaintiff is  
6 not disabled will be upheld if the findings of fact are supported  
7 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
8 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
9 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
10 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
11 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
12 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
13 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
14 evidence as a reasonable mind might accept as adequate to support  
15 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
16 (citations omitted). "[S]uch inferences and conclusions as the  
17 [Commissioner] may reasonably draw from the evidence" will also be  
18 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
19 On review, the Court considers the record as a whole, not just the  
20 evidence supporting the decision of the Commissioner. *Weetman v.*  
21 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
22 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

23 It is the role of the trier of fact, not this Court, to  
24 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
25 evidence supports more than one rational interpretation, the Court  
26 may not substitute its judgment for that of the Commissioner.  
27 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579

(9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### ALJ'S FINDINGS

At the outset the ALJ found plaintiff was last insured through December 31, 2008, for purposes of her DIB claim. (Tr. 23.) The ALJ found at step one that plaintiff has engaged in substantial gainful activity since onset, returning to work in March of 2006 at SGA levels, but he went on to make alternative findings<sup>1</sup>. (Tr. 23.) At steps two and three, the ALJ found plaintiff suffers from major depressive disorder, recurrent; borderline personality disorder; and substance addiction disorder (multiple substances), impairments that are severe but do not meet or medically equal a Listed impairment. (Tr. 23, 27.) The ALJ found plaintiff less than fully credible. (Tr. 31-32.) ALJ Payne assessed plaintiff's RFC, with DAA, which included moderate to marked limitations in the ability to interact appropriately with

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<sup>1</sup>Presumably the ALJ went beyond step one because the question remained whether plaintiff was disabled from onset in October of 2003 until she returned to work in March of 2006.

1 the public. With DAA, he also assessed the following moderate  
2 limitations: the ability to understand and remember detailed  
3 instructions; maintain attention and concentration for extended  
4 periods; work in coordination with or proximity to others without  
5 being distracted by them; get along with coworkers without  
6 distracting them or exhibiting behavioral extremes; respond  
7 appropriately to changes in the work setting; and set realistic  
8 goals or make plans independently of others. (Tr. 27.) With DAA,  
9 the ALJ assessed several mild to moderate limitations. (Tr. 27-  
10 28.) At step four, relying on the VE, the ALJ found plaintiff  
11 (with DAA) could not perform her past relevant work. At step five  
12 (with DAA), the ALJ relied on the VE and found plaintiff could not  
13 make an adjustment to other work. (Tr. 28-29.) This resulted in  
14 finding plaintiff disabled.

15 The ALJ then performed the requisite *Bustamante*<sup>2</sup> analysis and  
16 considered plaintiff's limitations without DAA. (Tr. 29-30.) He  
17 found the remaining limitations would cause more than a minimal  
18 impact on her ability to perform basic work activities; therefore  
19 plaintiff continued to have severe impairments. (Tr. 29.) At  
20 step three the ALJ found that without DAA, plaintiff's impairments  
21 did not meet or medically equal a Listing level impairment. (Tr.  
22 29-30.) Without DAA, the ALJ assessed an RFC with moderate  
23 limitations in the ability to interact appropriately with the  
24 public and a mild to moderate limitation in the ability to accept  
25 instruction from and respond appropriately to criticism from  
26 supervisors. (Tr. 30.) At the alternative step four, the ALJ

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27 <sup>2</sup>*Bustamante v. Massanari*, 262 F. 2d 949 (9<sup>th</sup> Cir. 2001).  
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1 found plaintiff could perform her past relevant work as a kitchen  
2 helper, short order cook, and janitor. (Tr. 32.) Alternatively,  
3 the ALJ found at step five, absent DAA, that plaintiff could work  
4 as a laborer, hand packager, cannery worker, sorter, sewing  
5 machine operator, and production assembler. (Tr. 32-33.) The ALJ  
6 found DAA is a contributing factor material to the disability  
7 determination. (Tr. 33.) The Act therefore bars payment of  
8 benefits.

### 9 ISSUES

10 Plaintiff contends that the Commissioner erred as a matter of  
11 law when he determined credibility and weighed the medical  
12 evidence. Specifically, plaintiff alleges the ALJ failed to  
13 properly assess (1) the opinion of testifying psychologist Allen  
14 Bostwick, Ph.D., and of treating psychologist Debra Brown, Ph.D.;  
15 (2) plaintiff's credibility; and (3) the effects of DAA. (Ct.  
16 Rec. 14 at 10-13.)

17 The Commissioner responds that the ALJ appropriately weighed  
18 the evidence and asks that the decision be affirmed. (Ct. Rec. 17  
19 at 25.)

20 The first issue is dispositive.

### 21 DISCUSSION

#### 22 A. Weighing medical evidence

23 In social security proceedings, the claimant must prove the  
24 existence of a physical or mental impairment by providing medical  
25 evidence consisting of signs, symptoms, and laboratory findings;  
26 the claimant's own statement of symptoms alone will not suffice.  
27 20 C.F.R. § 416.908. The effects of all symptoms must be  
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1 evaluated on the basis of a medically determinable impairment  
2 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
3 416.929. Once medical evidence of an underlying impairment has  
4 been shown, medical findings are not required to support the  
5 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
6 341, 345 (9<sup>th</sup> Cir. 1991).

7 A treating physician's opinion is given special weight  
8 because of familiarity with the claimant and the claimant's  
9 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
10 Cir. 1989). However, the treating physician's opinion is not  
11 "necessarily conclusive as to either a physical condition or the  
12 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
13 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
14 a treating physician than an examining physician. *Lester v.*  
15 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
16 weight is given to the opinions of treating and examining  
17 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
18 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
19 physician's opinions are not contradicted, they can be rejected  
20 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
21 If contradicted, the ALJ may reject an opinion if he states  
22 specific, legitimate reasons that are supported by substantial  
23 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
24 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

25 In addition to the testimony of a nonexamining medical  
26 advisor, the ALJ must have other evidence to support a decision to  
27 reject the opinion of a treating physician, such as laboratory  
28 test results, contrary reports from examining physicians, and

1 testimony from the claimant that was inconsistent with the  
2 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
3 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
4 Cir. 1995).

5 Plaintiff contends that the ALJ erred when he weighed Dr.  
6 Bostwick's opinion that plaintiff has zero to moderate limitations  
7 in the ability to accept instructions and respond appropriately to  
8 criticism from supervisors, when DAA is excluded. The ALJ  
9 seemingly accepted Dr. Bostwick's "zero to moderate limitation"  
10 when he questioned the vocational expert:

11 This individual would have a moderate limitation  
12 on ability to interact appropriately with the general  
13 public; and then, as far as - there would be a no  
14 significant limitation to a moderate limitation on  
15 ability to accept instructions and respond  
16 appropriately to criticism from supervisors; . . .

17 (Tr. 661.)

18 The VE attempted to clarify:

19 Are we assuming the mild to moderate limitation  
20 on the ability to accept instructions and respond  
21 appropriately to criticism from supervisors is mild?

22 (Tr. 662.)

23 **ALJ:** Well, it's mild - it can be mild to moderate. It, it,  
24 it - he - the, the medical expert didn't really clarify that.  
25 I guess it would depend on the circumstances of the, the  
26 supervisor, what kind of supervisor that person had.  
27 Generally, probably, would be okay. If you've got the wrong  
28 supervisor, it might rise to the moderate level.

**VE:** Um-hum. Well, at which point it rises to the moderate  
level, it would prevent any employment; but if we're saying  
it fluctuates, it would reduce the number of jobs - that

1 would be available to this individual.

2 (Tr. 662. )

3 The VE went on to testify that "if it wasn't a difficult  
4 supervisor," past relevant work as a kitchen helper, short order  
5 cook and janitor could be performed. (Tr. 663.) At step five,  
6 using the same RFC, the VE testified that a few of the other jobs  
7 that could be performed include store laborer, hand packager, and  
8 cannery worker. (Tr. 663-664.) On cross-examination, the VE  
9 reiterated that a moderate restriction on the ability to accept  
10 instructions and respond appropriately to criticism from a  
11 supervisor would *preclude all work*. (Tr. 665.) (Emphasis added.)  
12 She repeated the statement a third time. (Tr. 666.)

13 The ALJ is correct that Dr. Bostwick's opinion could be  
14 clearer. On the written form, without DAA, Dr. Bostwick  
15 assessed "no significant limitation to moderate limitation" in the  
16 ability to accept instructions and respond appropriately to  
17 criticism from supervisors. (Tr. 581.) He testified:

18 And 14, ability to accept instructions and respond  
19 appropriately to criticism from supervisors that's  
20 really hard to evaluation [sic] because there's no  
21 reference of record that - I would say that that's  
22 only mildly limited based on the record. Due to  
23 her fear of abandonment and sensitivity to rejection  
24 and manipulating others to see how they feel about  
25 her, she might at times have a moderate difficulty  
26 in that area. That pretty much depends on the  
27 relationship she would have with her supervisor,  
28 I believe.

24 (Tr. 617.)

25 In his written decision, the ALJ described Dr. Bostwick's  
26 testimony as "only mild to moderate limitations in her ability to  
27 accept instruction and respond appropriately to criticism from  
28 supervisors." (Tr. 617.)

1 It appears to the undersigned that Dr. Bostwick's somewhat  
2 vague opinion resulted in the ALJ giving the VE an unclear RFC; in  
3 turn, the VE's opinion at steps four and five are not fully  
4 supported by the record. Alternatively, the VE's testimony can  
5 be construed as opining that there are no jobs a person with  
6 plaintiff's "moderate" limitations can perform, testimony rejected  
7 by the ALJ. The error requires remand because it is not harmless.

8  
9 Plaintiff's ability to work by 2006 does not address  
10 limitations after onset but prior to 2006. The additional exhibit  
11 considered by the Appeals Council indicates plaintiff was not able  
12 to maintain employment.

13 The court expresses no opinion as to what the ultimate  
14 outcome on remand will or should be. The fact-finder is free to  
15 give whatever weight to the evidence is deemed appropriate. See  
16 *Sample v. Schweiker*, 694 F. 2d 639, 642 (9<sup>th</sup> Cir. 1982)  
17 ("Q)uestions of credibility and resolution of conflicts in the  
18 testimony are functions solely of the Secretary.")

19 **CONCLUSION**

20 Having reviewed the record and the ALJ's conclusions, this  
21 court finds that the ALJ's decision is free of legal error and  
22 supported by substantial evidence..

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
25 **GRANTED.** The case is remanded for further administrative  
26 proceedings.

27 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
28 **DENIED.**

1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel for Plaintiff and Defendant, enter  
3 judgment in favor of Plaintiff, and **CLOSE** this file.

4 DATED this 14th day of April, 2009.

5 s/ James P. Hutton

6 JAMES P. HUTTON  
7 UNITED STATES MAGISTRATE JUDGE  
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